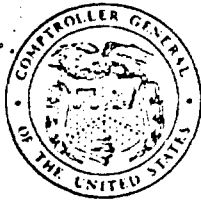


DECISION



THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D.C. 20548

60682

98443

FILE: B-184926

DATE: March 29, 1976

MATTER OF: Planning Research Corporation Public Management  
Services, Inc.

DIGEST:

1. Where U. S. District Court denied complainant's motion for temporary restraining order to enjoin award by grantee, and complainant then had case dismissed without prejudice, court's consideration of matter did not act as adjudication on merits so as to bar GAO's assuming jurisdiction over complaint.
2. Since Law Enforcement Assistance Administration Manual, which was promulgated pursuant to Omnibus Crime Control and Safe Streets Act, was not published in Federal Register, only parties with actual or constructive notice are bound by its contents and constructive knowledge exists where Manual is incorporated by reference into grant or contract.
3. Law Enforcement Assistance Administration (LEAA) organizational conflict of interest guideline precluding contractors who draft or develop specifications for LEAA grantee procurements from competing for those procurements, which was promulgated under LEAA rule-making authority and attached as binding condition on LEAA grants, is reasonably related to purposes of LEAA enabling legislation, since LEAA may impose reasonable conditions on its grants to assure Federal funds are expended in fiscally responsible and proper manner consistent with Federal interests, and condition is not imposed in contravention of any law.
4. LEAA organizational conflict of interest guideline is not inconsistent with Federal Management Circular (FMC) 74-7 Attachment O, since provisions of FMC 74-7-0 are matters of executive branch policy, which do not establish legal rights and responsibilities, and Office of Federal Procurement Policy has found guideline to be acceptable implementation of FMC 74-7-0.

5. LEAA "blanket" guideline for grantee procurements precluding contractors who develop or draft specifications for procurements from competing is reasonable exercise of LEAA discretion to implement grant procurement policy, since it was promulgated in response to congressional concern and in implementation of FMC 74-7-0 to insure bias free specifications and to prevent unfair competitive advantage by specifications' preparer.
6. LEAA organizational conflict of interest guideline for grantee procurements, which reads: "Contractors that develop or draft specifications, requirements, statements of work and/or RFP's for a proposed procurement shall be excluded from bidding or submitting a proposal to compete for the award of such procurement" is not unenforceably vague, since terms used in guideline have clear meaning in this context.
7. Where contractor of LEAA grantee developed and drafted specifications, which were substantially identical to those used in RFP, which also incorporated contractor-developed "requirements" study, contractor comes under LEAA organizational conflict of interest guideline, which was attached as condition to LEAA grant, was binding on grantee and precludes contractor from competing on RFP.
8. Contractor has constructive notice of LEAA organizational conflict of interest guideline where it was contained in document incorporated by reference in contract requiring the preparation of specifications. In any case, since guideline is attached as condition to LEAA grant, it is self-executing, and grantee is bound to reject contractor's proposal if contractor fell under guideline, notwithstanding grantee's inadequate notice and contrary advice to contractor.
9. Contractor, precluded by LEAA organizational conflict of interest guideline from competing on LEAA grantee's procurement for which it drafted and developed specifications, has not shown that LEAA refusal to grant waiver of guideline, promulgated under LEAA rule-making authority and binding on grantees, was for reasons so insubstantial as to constitute abuse of discretion.

10. Estoppel has not been established against LEAA application of organizational conflict of interest guideline for grantee procurements to prevent grantee award to offeror, who developed and drafted specifications, notwithstanding assurances given to offeror by grantee that it could compete, since grantee's assurances cannot bind LEAA and LEAA apparently was not aware of all facts showing offeror came under guideline prior to communicating this fact to grantee.
11. Proposal preparation costs claim by offeror, whose award selection was not approved by LEAA because it came under LEAA organizational conflict of interest guideline imposed as limitation on grantee procurements, is denied since rejection of proposal was not arbitrary or capricious. Allocated overhead directly related to offeror's efforts to obtain waiver of LEAA guideline is not recoverable in any case.

#### INTRODUCTION

Planning Research Corporation Public Management Services, Inc. (PRC/PMS), has filed a complaint in our Office against the validity of an organizational conflict of interest guideline imposed by the Law Enforcement Assistance Administration (LEAA), United States Department of Justice, on LEAA grant supported procurements by state and local governments and against the application of the guideline to exclude PRC/PMS from competition on a procurement by the City and County of Denver, Colorado (Denver). The Denver procurement was to implement the Police Data Center, an automatic data processing (ADP) system for the Denver Police Department.

The protested organizational conflict of interest guideline is the last sentence of paragraph 49e of LEAA Guideline Manual M7100.1A, entitled "Financial Management for Planning and Action Grants," dated April 30, 1973 (Manual 7100.1A). The manual is incorporated into all LEAA grants. Paragraph 49e, as amended by Change 1, dated January 24, 1974, states:

"Adequate Competition. All procurement transactions regardless of whether negotiated or advertised and without regard to dollar value shall be conducted in a manner so as to provide maximum open and free competition. The grantee should be alert to organizational conflicts of interest or noncompetitive practices among contractors

which may restrict or eliminate competition or otherwise restrain trade. Contractors that develop or draft specifications, requirements, statements of work and/or RFPs for a proposed procurement shall be excluded from bidding or submitting a proposal to compete for the award of such procurement." (Emphasis supplied.)

#### BACKGROUND

Under the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3701 et seq. (1970), LEAA awarded grant No. 73-DF-08-0029 to the Colorado Division of Criminal Justice (Colorado) on June 29, 1973, to fund the Denver High Impact Anti-Crime Program. The Application for Grant Discretionary Funds, to which Colorado agreed in accepting the grant, stated:

"(15.) Third Party Participation. No contract or agreement may be entered into by the grantee for execution of project activities or provision of services to a grant project (other than purchase of supplies or standard commercial or maintenance services) which is not incorporated in the approved proposal or approved in advance by LEAA. Any such arrangements shall provide that the grantee will retain ultimate control and responsibility for the grant project and that the contractor or subgrantee shall be bound by these grant conditions and any other requirements applicable to the grantee in the conduct of the project.

\* \* \* \* \*

"(17.) Fiscal Regulations. The fiscal administration of grants shall be subject to such further rules, regulations, and policies, concerning accounting and records, payment of funds, cost allowability, submission of financial reports, etc., as may be prescribed by LEAA, including those set forth in the LEAA Financial Guide, OMB

Circulars A-21, A-87 and A-102 as well as \$15 of FPR (41 CFR \$15.000, et. seq.), where applicable."

As part of the Denver High Impact Anti-Crime Program, a subgrant was awarded to Denver on May 15, 1974. The subgrant also incorporated paragraphs 15 and 17. The subgrant funded a contract for consulting services preparatory to implementing the Police Data Center project.

Request for proposals (RFP) M-15400 for a 60-day consultant study had been issued by Denver on April 12, 1974. Award was contingent on receiving LEAA funding and approval of the contractor selection by Colorado and LEAA. The statement of work for the RFP consisted of the following four tasks:

- "A. The identification and analysis of the operation, administration planning, evaluation and reporting requirements of the Denver Police Department to define cost effective automated data processing alternatives to support these functions.
- "B. Define the data exchange requirements of the Denver Police Department with other criminal justice and support agencies including their content, format, time, and other requirements and constraints.
- "C. Develop and recommend alternative hardware and software configurations to satisfy the requirements identified in A and B above. Consideration should be given to the existing data processing capabilities of the total criminal justice information system and/or data processing capabilities of the City and County of Denver. The criteria of establishing the order of preference should be identified and presented.
- "D. Prepare procurement documentation (specifications, evaluation plans, bid lists, etc.) to implement the selection of hardware and its procurement for both purchase, lease, or combination thereof."  
(Emphasis supplied.)

B-184926

The RFP also provided:

"It is the intent of this study to provide an objective analysis of the requirements of the Denver Police Department and recommendation of optimum hardware and software packages to accomplish the objectives.

"To this end, the successful bidder on the study shall agree to a hardware exclusion provision of any hardware to be purchased or leased in the implementation of any program defined by the study."

PRC/PMS contends that prior to submitting its proposal it contacted Denver and asked whether the above-quoted "hardware exclusion" clause would prevent PRC/PMS from competing for the later implementation contract should PRC/PMS be awarded the study contract. PRC/PMS states that it was assured by Denver, after Denver checked with LEAA, that the exclusionary clauses applicable to the study and implementation contracts were limited to hardware manufacturers. LEAA denies consulting with Denver regarding this matter.

On June 24, 1974, after obtaining the requisite approvals, PRC/PMS was awarded the study contract by Denver. Contract clause 26, in pertinent part, states:

"Conformity to Applicable Regulations. The Client and PRC/PMS agree that they will be bound by the terms of the Omnibus Crime Control and Safe Streets Act of 1968; the Guide for Comprehensive Law Enforcement Grants and Action Grants under such Act; the Financial Guide for Administration of Planning and Action Grants of such Act; and any and all applicable regulations of the Law Enforcement Assistance Administration (LEAA) and implementing Colorado legislation and administrative regulations in effect at the time this Agreement is signed by

the representatives of the Client and PRC/PMS.  
\* \* \* (Emphasis supplied.)

In July 1974, PRC/PMS completed and submitted to Denver a "requirements" study to satisfy tasks A, B, and C of the study contract, and a "hardware" study to satisfy task D.

On August 30, 1974, Denver submitted a subgrant application to fund the implementation phase of the Police Data Center project. In the application, Denver again agreed to standard grant conditions 15 and 17. The funds for the project were authorized by LEAA in a grant adjustment notice dated November 19, 1974. As a special condition to the grant adjustment, LEAA, in pertinent part, provided:

- "5. Grantee agrees that any contract between the grantee and a group, firm, institution or individual to conduct all or any part of the work contemplated by this grant shall be subject to the competitive bid process. This competitive bid process must be consistent with LEAA procurement guidelines and the applicable laws and requirements of the State of Colorado. Further, any contract resulting from this grant shall be subject to prior approval of such contract and its project budget by LEAA. No expenditure of grant funds is authorized for payment to the primary contractor until after formal approval of the contract has been received from LEAA. \* \* \* (Emphasis supplied.)

On November 20, 1974, a subgrant was awarded by Colorado to Denver incorporating special condition 5 as well as standard grant conditions 15 and 17.

On April 8, 1975, Denver issued RFP 8342 to implement the Police Data Center. PRC/PMS was on the bidders list for the procurement. The scope of work for the project, which consisted of two 18-month phases, was summarized at section A.2 of the RFP as follows:

"The scope of work to be accomplished in this project is twofold for both Phase I and Phase II. Number One is to develop the systems and programs for Phase I and Phase II as outlined in this proposal and which will at the completion of this contract become the property of the City. Number Two is to furnish, install and lease with option to purchase to the City, all hardware necessary to implement these systems and programs for Phase I and Phase II. Bidder's Proposals will be evaluated and one prime contractor selected to have full responsibility of providing a Turn Key System for both the systems, programs and hardware."

The RFP only covered Phase I. Phase II was an option. In addition, Section B.13 of the RFP, in pertinent part, stated:

"\* \* \* Disclaimer: In the Request for Proposal for the Denver Police Department Information Requirements Analysis and Implementation Plan, there was a provision that the successful bidder could not be a hardware manufacturer. Compliance of this provision was satisfied and there are no restrictions relative to this exclusion to the list of prospective bidders for this RFP."

Many portions of the RFP were incorporated from the "hardware" report which PRC/PMS prepared under its previous contract. Also, PRC/PMS's "requirements" study report was attached to the RFP. LEAA reviewed and approved the RFP prior to its issuance.

On April 18, 1975, Denver conducted a bidders conference. PRC/PMS reports that Denver answered a question regarding PRC/PMS's eligibility to compete on this procurement in the affirmative specifically referring to section B.13 of the RFP.

By letter dated April 30, 1975, LEAA's Acting Regional Administrator advised Colorado that paragraph 49e of Manual 7100.1A was applicable to PRC/PMS for this procurement. The Acting Administrator found:

"The successful bidder for the Information Requirements Analysis and Implementation Plan was [PRC/PMS] \* \* \*. In addition to the Implementation Plan which was distributed



with the current RFP, PRC developed the hardware specifications that are contained in the RFP. These specifications were only slightly modified before issuance of the RFP."

Denver immediately requested reconsideration of this determination. On May 8, 1975, the Regional Administrator affirmed the determination. The Regional Administrator also stated that LEAA had initiated this action on the same day that it became aware of all of the facts requiring a finding that PRC/PMS fell under the organizational conflict of interest guideline.

Even though the Acting Administrator's letter informed the grantee to advise PRC/PMS of the LEAA position, neither the grantee nor subgrantee did so. However, apparently sometime prior to May 12, 1975, PRC/PMS learned of LEAA's position through the industry "grapevine." PRC/PMS confirmed this fact with Denver prior to the closing date for receipt of proposals.

On May 15, 1975, notwithstanding LEAA's advice, Denver decided to let the procurement process continue, and to accept any PRC/PMS proposal submitted. On May 19, 1975, the closing date for receipt of proposals, five proposals were received. Only the proposals of PRC/PMS and Mauchly-Wood Systems Corporation (MWSC) were found to be within a competitive range. PRC/PMS received a technical score of 221 points and MWSC received a score of 212 points. On June 25, 1975, Denver selected PRC/PMS for award. On June 26, 1975, Denver asked LEAA to approve the award selection.

Earlier, on May 27, 1975, PRC/PMS asked the LEAA Deputy General Counsel for a legal opinion as to the applicability of paragraph 49e of Manual 7100.1A. After a complete review by the Deputy General Counsel, the Regional Administrator on July 11, 1975, again found that PRC/PMS could not be considered eligible for award. LEAA also found that there were no grounds for a retroactive waiver of paragraph 49e. Consequently, the PRC/PMS award selection was disapproved.

On July 28, 1975, PRC/PMS petitioned the LEAA Administrator to review the matter. At the direction of the LEAA Administrator, the Deputy Administrator for Administration reviewed LEAA's position. It was affirmed on August 7, 1975.

B-184926

On August 22, 1975, PRC/PMS filed Civil Action No. 75-F-903 in the United States District Court for the District of Colorado. This suit, which involved the same bases for complaint as raised by PRC/PMS here, was to enjoin an award under the RFP to any firm other than PRC/PMS. On the same date, a hearing was held on PRC/PMS's motion for a temporary restraining order. The motion was denied by the court. On September 5, 1975, PRC/PMS had the action dismissed without prejudice pursuant to Rule 41(a)(1) of the Federal Rules of Civil Procedure. The District Court's consideration of this matter did not act as an adjudication on the merits so as to bar our Office's assuming jurisdiction over PRC/PMS's complaint. See Guy F. Atkinson Company, et al. B-183842, December 9, 1975, 55 Comp. Gen.\_\_\_\_\_, 75-2 CPD 378.

Award was made to MSWC. On September 15, 1975, PRC/PMS filed here its complaint against LEAA's actions with regard to the Denver procurement. At that time, PRC/PMS also complained that the organizational conflict of interest guideline was apparently going to be applied to an LEAA funded procurement by the City of Philadelphia, Pennsylvania. However, on December 2, 1975, LEAA found that PRC/PMS was eligible to bid on the Philadelphia procurement since it did not fall under the guideline. Therefore, this portion of PRC/PMS's complaint is moot and will not be considered further.

In summary, with regard to the Denver procurement, PRC/PMS complains that (1) LEAA had no reasonable basis for the guideline, and that the guideline was in excess of LEAA's statutory authority and in conflict with Federal Management Circular 74-7 Attachment 0 (FMC 74-7-0); (2) the guideline was vague and not susceptible to clear definition; (3) the guideline was improperly applied to bar PRC/PMS from the Denver implementation procurement; (4) PRC/PMS was not given adequate notice of the possible applicability of the guideline, which was inconsistent with basic Federal procurement principles; and (5) LEAA was estopped from rejecting PRC/PMS's award selection in view of the repeated advice given to PRC/PMS that it would not be barred from competition. As relief for these allegedly improper procurement actions, PRC/PMS requests our Office to recommend (1) the elimination of the organizational conflict of interest guideline from LEAA's regulations; (2) the termination of the present contract with MWSC and an award of the contract to PRC/PMS; (3) that the Phase II option not be implemented without competition (we understand that Denver has decided not to exercise the option); and (4) that PRC/PMS be awarded its proposal preparation costs. PRC/PMS claims \$4,403 in proposal preparation costs and \$8,061 of

allocated overhead costs directly related to efforts to obtain a waiver of the LEAA guideline.

VALIDITY OF LEAA ORGANIZATIONAL CONFLICT OF INTEREST GUIDELINE

PRC/PMS alleges that the organizational conflict of interest guideline is an invalid requirement for the reasons which are discussed in detail below. As indicated in the Public Notice issued by our Office entitled "Review of Complaints Concerning Contracts Under Federal Grants," 40 Fed. Reg. 42406 (1975), it is not our intent in reviewing complaints against awards by Federal grantees "to interfere with the functions and responsibilities of grantor agencies in making and administering grants." However, we will review the validity of the LEAA guideline here, since it is alleged to be restrictive of free and open competition.

Authority to Issue Guideline

PRC/PMS contends that the guideline is in excess of LEAA's statutory authority, since it is not related to any purposes of the Omnibus Crime Control and Safe Street Act of 1968, supra, which created LEAA. PRC/PMS also states that the legislative history reveals no congressional intent that LEAA develop such a uniquely restrictive policy governing its grantees' procurements.

Manual 7100.1A was promulgated by LEAA pursuant to section 501 of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. § 3751 (1970), which provides:

"The Administration is authorized, after appropriate consultation with representatives of States and units of general local government, to establish such rules, regulations, and procedures as are necessary to the exercise of its functions, and are consistent with the stated purpose of this chapter."

The manual has not been published in the Federal Register. Thus, only parties with actual or constructive notice of the manual are bound by its requirements. Dow Pump Co. v. United States, 68 Ct. Cl. 175 (1929); Turney v. United States, 115 F. Supp. 457 (Ct. Cl. 1953); Kurz & Root Company, Inc., ASBCA No. 17146, 74-1 BCA

10543 (1974). Contrast Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947), and AST/Servo Systems, Inc. v. United States, 449 F.2d 789 (Ct. Cl. 1971). As discussed in detail below, constructive notice exists where the manual has been incorporated by reference into a contract or grant.

With regard to an agency's general authority to issue regulations, such as Manual 7100.1A, the United States Supreme Court has held:

"\* \* \* Where the empowering provision of a statute states simply that the agency may 'make . . . such rules and regulations as may be necessary to carry out the provisions of this Act,' we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.' Thorpe v. Housing Authority of the City of Durham, 393 U.S. 268, 280-281 (1969). See also American Trucking Assns. v. United States, 344 U.S. 298 (1953)." (Footnote omitted.)

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1972). Further, the Supreme Court has recognized that, in order for Government agencies to properly administer congressionally created and funded programs, they must formulate policy and make rules to fill any gaps left, implicitly or explicitly, by Congress. See Morton v. Ruiz, 415 U.S. 199, 231 (1974).

The Supreme Court has also approved the propriety of a grantor agency attaching such rules as conditions to its grants in stating:

"There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any

state law or regulation inconsistent with such federal terms and conditions is to that extent invalid. See Ivanhoe Irrigation District v. McCracken, 357 U.S. 275, 295 (1958); Oklahoma v. Civil Service Comm'n, 330 U.S. 127, 143 (1947).  
\* \* \*

King v. Smith, 392 U.S. 309, 333, f.n. 34 (1968). These conditions can be attached to grants for the purpose of insuring that certain Federal interests are protected in the expenditure of grant money, even though it may be that these interests are not otherwise directly related to the purposes of the enabling legislation authorizing the grant. See Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159, 171 (3rd Cir. 1971).

Our Office has recognized the propriety of imposing conditions on grantees, such as a requirement for open and competitive bidding in federally funded procurements by grantees, to help assure that Federal funds are expended in a fiscally responsible and proper manner consistent with the Federal interests. See 48 Comp. Gen. 326 (1968); Illinois Equal Employment Opportunity Regulations for Public Contracts, 54 Comp. Gen. 6 (1974), 74-2 CPD 1; Copeland Systems, Inc., 55 Comp. Gen. 390 (1975), 75-2 CPD 237. Such conditions must be considered "reasonably related to the purposes" of the enabling legislation if they are not imposed in contravention of the legislation or any other Federal law. See King v. Smith, supra; Contractors Association of Eastern Pennsylvania v. Secretary of Labor, supra. A grantee receiving Federal funds is required to meet such federally imposed requirements as a condition to receiving Federal monies. See King v. Smith, supra; Illinois, supra. Consequently, although the Federal Government is not a party to contracts awarded by its grantees, a grantee must comply with the conditions attached to the grant in awarding federally assisted contracts. See Illinois, supra.

Paragraph 49e does not contravene any provisions of the Omnibus Crime Control and Safe Streets Act, supra, or any other Federal law of which we are aware. Also, as discussed in detail below, paragraph 49e is reasonably related to the Act's purposes. Although PRC/PMS has asserted that the guideline creates a fundamental imbalance in the Federal Government-grantee relationship by virtue of the Government's allegedly unwarranted intrusion into grantee source selection, LEAA has the discretion to impose reasonable conditions on its grants to assure that LEAA funded contracts are awarded in a fiscally responsible manner.

Guideline's Consistency with Federal Management Circular 74-7

FMC 74-7-0 was promulgated by the General Services Administration (GSA) pursuant to Executive Order 11717, 38 Fed. Reg. 12316 (1973). Responsibility for FMC 74-7-0 was transferred to the Office of Federal Procurement Policy (OFPP) of the Office of Management and Budget by Executive Order 11893, 41 Fed. Reg. 1040 (1976). FMC 74-7-0 is intended to provide uniform standards for use by state and local governments in establishing procedures for procurements with Federal grant funds, and to insure that materials and services are obtained under such procurements in an "effective" (e.g., fiscally responsible) manner and in compliance with provisions of applicable Federal law.

LEAA has stated that Manual 7100.1A was intended to assure sound and responsible financial management in the expenditure of LEAA grant monies. In this regard, the manual implements many of the FMC 74-7-0 provisions. In particular, LEAA promulgated paragraph 49e of the manual to implement paragraph 3b of FMC 74-7-0. Paragraph 3b reads the same as the first two sentences of paragraph 49e.

PRC/PMS asserts that paragraph 49e is inconsistent with paragraph 3b of FMC 74-7-0 because of the third sentence of paragraph 49e. PRC/PMS states that being "alert" to an organizational conflict of interest does not envision a "blanket" exclusion of bidders from competition in every case where the bidders are responsible for developing or drafting specifications, requirements, statements of work and/or RFP's for the procurement. In this regard, PRC/PMS refers to paragraph 1 of FMC 74-7-0, the last sentence of which reads:

"\* \* \* No additional requirements shall be imposed by the Federal agencies upon the grantees unless specifically required by Federal law or Executive orders."

LEAA took the position in adding the third sentence of paragraph 49e that it was not imposing an additional requirement, but rather was refining and specifically implementing the second sentence of paragraph 3b of FMC 74-7-0. LEAA has stated that if an offeror was under the exclusionary rule of the third sentence of paragraph 49e, it also would be excluded under paragraph 3b.

We regard the provisions of FMC 74-7-0 as matters of executive branch policy, which do not establish legal rights and responsibilities, and which are not ordinarily within the decision functions of the General Accounting Office. See section 1 of Executive Order 11893, supra; 43 Comp. Gen. 217, 221 (1963); 53 Comp. Gen. 86, 88 (1973); Federal Leasing, Inc., 54 Comp. Gen. 872 (1975), 75-1 CPD 236; PRC Computer Center, Inc., et al., 55 Comp. Gen. 60, 68 (1975), 75-2 CPD 35.

PRC/PMS had protested on September 8, 1975, LEAA's implementation of paragraph 3b of FMC 74-7-0 to GSA, which at that time had the responsibility for FMC 74-7-0. In letter dated January 26, 1976, OFFP (which now has the responsibility for FMC 74-7-0) stated:

"\* \* \* the LEAA Guideline is an acceptable implementation of FMC 74-7-0 and is not an additional requirement precluded by FMC 74-7. The type of practice prohibited by the LEAA Guideline is clearly within the intended purpose of the FMC organizational conflict of interest statement."

In view of the foregoing, we do not believe we can conclude that LEAA's guideline is inconsistent with FMC 74-7-0.

#### Reasonableness of Guideline

PRC/PMS contends that the "blanket" organizational conflict of interest exclusionary rule in paragraph 49e is unprecedented in the Federal Government. PRC/PMS alleges that such a broad limitation on grantee procurements lacks a reasonable basis.

PRC/PMS contends that the rule was promulgated without any consideration of its adverse effect on professional services firms, especially those firms involved in law enforcement systems. PRC/PMS explains that the relatively few professional services firms who perform the kind of work funded through LEAA grants are generally and properly involved in both the preparation of feasibility studies for and the implementation of law enforcement systems.

PRC/PMS claims the exclusion through the guideline of such professional services firms from their area of competence will reduce rather than enhance competition. PRC/PMS explains that each of these firms will have to consider carefully whether it will compete for a substantially smaller study contract and take the chance of excluding itself from competition for the much larger implementation contract. PRC/PMS asserts that this may cause the more qualified professional services firms, which have gained exceptional experience and capability through performing implementation as well as study contracts, not to bid for the study contracts. PRC/PMS says that not only will this lessen competition for the study contracts, but also an inadequate study or poorly defined requirements for the "follow-on" implementation contract may result. PRC/PMS claims that this could cause competent firms to decline to bid on the implementation RFP because the grantee would not have a workable system defined in the solicitation and potential bidders would not know what was going to be required of them.

Also, PRC/PMS contends that if professional services firms, which perform studies, are removed from competition on implementation contracts, more hardware manufacturers may bid on the implementation contracts with the intent of supplying their own equipment, even if it does not best suit the grantee customer's needs. Also, since there would be no real incentive for professional services firms to bid on the study contracts, more hardware manufacturers may become involved, which would increase the likelihood of "real" organizational conflicts of interest as discussed below.

PRC/PMS contends that LEAA grantees will be adversely impacted by the guideline, since qualified firms with no demonstrable conflict of interest will be excluded from competition under the guideline, notwithstanding that they may be in the best position to understand the grantees' requirements under the implementation contract.

PRC/PMS also points out that such guidelines have historically only been applied to hardware manufacturers. PRC/PMS claims that hardware suppliers, by recommending their own equipment, could create a "real" organizational conflict of interest situation by developing specifications reflective of their own equipment without regard to the grantee customer's best interests. On the other hand, PRC/PMS claims that non-hardware firms do not have the same kind of incentive to bias the specifications to gain an unfair competitive advantage.



B-184926

PRC/PMS specifically references Armed Services Procurement Regulations (ASPR) Appendix G (1975 ed.), one of the few organizational conflict of interest regulations applicable to Federal procurements, to support its position in this regard. These ASPR provisions, in the ordinary case, are only applied to hardware suppliers. Also, an exclusionary organizational conflict of interest clause can only be made applicable under ASPR after a complete analysis of the relative benefits and detriments of including such a limitation. See ASPR s 1-113.2(b)(2) (1975 ed.).

PRC/PMS also contends that an organizational conflict of interest cannot be judged by a "blanket" irrebuttable presumption that contractors, who were involved in preparing the specifications or statements of work, have such conflicts of interest as to justify barring them from competition. PRC/PMS claims that such conflicts can only be judged by evaluating the complete circumstances after the proposals on the implementation contract have been received to see if the specifications were really biased or if the contractor gained an unfair competitive advantage by virtue of writing the specifications.

In promulgating organizational conflict of interest rules, the legitimate Government interests of preventing bias in study contracts and protecting against unfair competitive advantages of contractors who prepared the implementation contracts' specifications should be carefully balanced against the Government's legitimate interests in awarding a contract that will best serve its needs to the most qualified contractor. See Report of the Commission on Government Procurement, Volume 2, pp. 47-49 (1972); 51 Comp. Gen. 397 (1972); H. J. Hansen Company, B-181543, March 28, 1975, 75-1 CPD 187. It is a general policy of the Federal Government to allow all interested qualified firms an opportunity to participate in its procurements in order to maximize competition unless there is a clearly supportable reason for excluding a firm. See PRC Computer Center, Inc.,

B-184926

supra, at 81. The foregoing interests should be carefully balanced to insure the Government's best interests are served by the guideline.

Nevertheless, absent a showing of demonstrable unreasonableness or a violation of statute or regulation, the responsibility for balancing the foregoing interests and deciding whether or not to have such an organizational conflict of interest requirement is primarily a matter of grant procurement policy for resolution by the concerned agency. See 51 Comp. Gen. 397; Gould Inc., Advanced Technology Group, B-181448, October 15, 1974, 74-2 CPD 205. Cf. 51 Comp. Gen. 609 (1972); 53 Comp. Gen. 382 (1973); Kenneth R. Bland, 54 Comp. Gen. 835, 75-1 CPD 207. Included among the interests balanced by LEAA are the countervailing factors which have been advanced by PRC/PMS in support of its complaint that the guideline is unreasonable.

With the foregoing in mind, we will now discuss the reasons given by LEAA in support of its promulgation of paragraph 49e.

First, as indicated above, LEAA takes the position that the third sentence of paragraph 49e of Manual 7100.1A implements FMC 74-7-0, and is a reasonable definition of a specific instance in which such an organizational conflict of interest exists that paragraph 3b of FMC 74-7-0 would also be for application. That is to say, LEAA has found that there would always be an improper organizational conflict of interest if a firm, which prepared specifications, requirements, statements of work and/or RFP's for a LEAA funded procurement were allowed to compete on that procurement. As indicated above, OFPP concurs with LEAA that this guideline is a proper implementation of FMC 74-7-0.

Second, LEAA regards this guideline as necessary to fulfill its responsibility under 31 U.S.C. § 628 (1970) by providing financial management and accountability requirements to assure that the grant funds are applied only to the purposes and objects for which they are made available.

Third, a specific impetus for imposing the guideline was congressional concern over organizational conflicts of interest

B-184926

in LEAA funded grantee contracts. Much of the congressional concern expressed was over possible organizational conflicts of interest involving equipment manufacturers marketing their products to LEAA grantees and the excessive use of consultants by LEAA grantees. However, considerable concern was also expressed over the propriety of consultants preparing specifications and then performing the resulting contracts for LEAA grantees. See House Comm. on Government Operations, Block Grant Programs of the Law Enforcement Assistance Administration, H.R. Rep. No. 92-1072, 92d Cong., 2d Sess. 49, 55-57 (1972). In response to the congressional concern, LEAA, on February 20, 1973, notified a congressional oversight committee of its intent, in the future, to prohibit contractors from developing specifications and then competing for an award based on those specifications.

Fourth, in 1973, LEAA was advised by the Anti-Trust Division of the Department of Justice as follows:

"\* \* \* There is one practice prevalent in this field which we believe could have anti-competitive effects and would also appear to result in a bad procurement policy. It seems to be a general practice on the part of purchasers of this equipment to have the manufacturers or suppliers prepare the specifications. We suggest that you might be well advised to issue regulations forbidding this and requiring that the specifications be drawn by disinterested parties. Such a ruling on your part would be a healthy one from a competitive standpoint."

Even though the Anti-Trust Division opinion was primarily concerned with hardware manufacturers, LEAA could reasonably find that this concern was applicable in all cases where the contractor prepared the specifications under which it later performed a contract.

Finally, LEAA explains:

"\* \* \* LEAA has determined that the only reasonable way to insure bias free specifications is to preclude from the competition the contractor who

prepared the specifications. The LEAA organizational conflict of interest provision serves three purposes to assure open and competitive bidding in grantee procurements. First, it prevents a contractor from developing restrictive specifications, requirements, statements of work and/or RFPs.

"The second purpose is that LEAA wants to insure that grantees or subgrantees receive maximum benefit from the contractual award of LEAA funds. By placing a contractor in a position where he will be unable to bid on a subsequent phase of the project or program which will be based upon the work the contractor is currently performing, the objectivity of the contractor's services and advice under the contract will be assured. In addition, the contractor will not derive any benefit from explicitly or implicitly withholding any specific knowledge or data which may be used to his advantage in the subsequent procurement phase of the project or program. Hence, there will be no conflicts with the best interests of the contractor's client.

"The third purpose is to safeguard the integrity of the competitive bidding system. Paragraph 49e preserves the integrity of the competitive bidding system by precluding from bidding a contractor who may have been placed in an advantageous position by contractual performance in regard to a prior phase of the project or program. The advantageous position may be in the form of detailed prior knowledge of the requirements and/or specifications, specific knowledge of the needs and preferences of the persons who would be involved in the selection process, additional time advantage, and deterrence of participation by potential bidders by the appearance of an organizational conflict of interest. As a result, the LEAA organizational conflict of interest provision gives all companies an equal right to compete for contracts under Federal grants, prevents unjust favoritism, collusion, or fraud in the letting of contracts under Federal grants, permits competitors to compete on a common basis, and presents to the general public as well as all participants in the

B-184926

competitive bidding process the appearance as well as in the fact that the bidding process will be a true competition."

In support of its position that LEAA's guideline is unreasonable, PRC/PMS has cited cases, such as Exotech Systems, Inc., 54 Comp. Gen. 421 (1974), 74-2 CPD 281, and PRC Computer Center Inc., *supra*, wherein we found that offerors should not be excluded from competition simply on the basis of a theoretical or potential conflict of interest. These cases are not applicable here. In each of the cases cited, although a protester contended that an award represented an organizational conflict of interest, there were no applicable regulatory or RFP provisions which in any way precluded the protested contractor from receiving the award.

We have recognized the propriety of imposing organizational conflict of interest provisions under appropriate circumstances, even where there is no specific regulation providing therefor. For example, in PRC Computer Center, Inc., *supra*, at 81, we recognized that an offeror could be excluded from competition because of an organizational conflict of interest if there was "a clearly supportable reason for so limiting competition." Also, in 51 Comp. Gen. 397 and Gould, *supra*, we recognized the validity of RFP clauses which disqualified certain firms from the competition because of "conflicts of interest \* \* \* inherent in the program contemplated," since they had been properly and adequately justified, even though there was no regulation providing for the clauses.

Similarly, the parallel PRC/PMS seeks to draw between the LEAA guideline and our decisions which recognize the general impropriety of prequalifying offerors for a procurement, see, e.g., 53 Comp. Gen. 209 (1973), is not applicable. As was recognized in 53 Comp. Gen. *supra*, prequalification of offerors can be justified if the procedures are not unduly restrictive and can otherwise be justified by clearly supportable reasons. See, e.g., B-135504, May 2, 1958, involving the Army's use of Qualified Manufacturers' Lists.

While the foregoing decisions involve direct Federal procurements, we believe a grant agency has no less discretion to

promulgate grant conditions precluding a bidder from competing for a grantee contract for the purpose of insuring bias-free specifications and free and open competition, so long as the conditions do not unduly restrict competition. It is clear that not all contractors who prepare requirements studies for LEAA funded projects are barred under the guideline from competing for "follow-on" implementing contracts. See, e.g., the LEAA funded Philadelphia procurement on which PRC/PMS can compete even though it performed a requirements study for Philadelphia.

We recognize that application of the LEAA guideline may adversely impact competition, particularly with regard to firms in the professional services industry. However, this impact must be weighed against the possible adverse impact on competition for the implementation contract if the guideline is ignored. We think the LEAA concerns already quoted are reasonable, and that the guideline is not an undue restriction on competition.

Also, we agree with LEAA that it would be impractical to ascertain whether a conflict of interest exists only after the offers are received on the "follow-on" procurement. Qualified firms may already have been discouraged from competing by the possible advantage obtained by the specification preparer. The incentive to bias specifications arises whenever the study contractor is eligible for the "follow-on" contract award.

We recognize that organizational conflict is treated differently and more selectively in ASPR Appendix G (1975 ed.), which has generally been applied only against hardware manufacturers and suppliers. However, for the reasons already stated, we conclude that the LEAA guideline is reasonable.

#### CLARITY OF LEAA GUIDELINE

PRC/PMS also contends that the third sentence of paragraph 49e is vague and not susceptible to clear definition. PRC/PMS alleges that there is nothing to show what is meant by the words "specifications," "requirements," and "statements of work," as used in the guideline. In addition, there is nothing defining "a proposed procurement," either in terms of subject matter or time, despite the fact that study and implementation phases of LEAA

funded projects can take many forms. PRC/PMS contends that some definition has to be provided for these terms since they are restrictive of competition. PRC/PMS concludes that the guideline is therefore unenforceably vague.

We disagree. The terms "specifications," "requirements," "statements of work" and "RFPs" have clear and generally recognized meanings in procurement. We do not believe the term "a proposed procurement" has to be further defined. Under the LEAA guideline, the awardee of a contract for drafting or developing specifications, requirements, statements of work or RFP's will be excluded from competing for a subsequent procurement, which incorporates them as material provisions.

#### APPLICABILITY OF GUIDELINE TO PRC/PMS

PRC/PMS alleges that its actions under the study contract do not fall under the guideline. However, PRC/PMS's "requirements" study detailing a proposed approach to automated information system development by Denver, made to satisfy tasks A, B and C of the study contract, was totally incorporated into the implementation RFP.

More importantly, our technical review disclosed that the specifications in PRC/PMS's study, "Denver Police Data Center Hardware," drafted to satisfy task D, are substantially identical to the implementation RFP specifications.

The terms of many of the implementation RFP requirements are identical to those drafted by PRC/PMS. The bulk of the other RFP specifications are closely derived from the "hardware" study with only minor changes made. For example, the video terminals described in the two documents are virtually identical (there are some minor differences in the keyboards), even though there are a wide variety of video terminal devices on the market with variant optional features depending on the manufacturer.

There are some differences we have found between the specifications of the "hardware" study and the RFP. For example, the RFP specifically requires the direct access storage devices to

be switchable and shared between the two system central processing units. The hardware study does not specifically so provide. Also, the RFP requires main memory to be expandible to 256,000 characters. The "hardware" study called for 128,000 characters. The foregoing differences provide Denver with increased flexibility and capacity in the ADP system. However, we do not regard the differences significant in terms of the ADP system defined by the "hardware" study specifications. Accordingly, it was reasonable to conclude that the LEAA guideline precluded PRC/PMS's participation in the implementation procurement.

In arguing against the applicability of the guideline, PRC/PMS primarily refers to the alleged lack of conceptual detail and bias in the "requirements" study. However, this does not respond to the determination that PRC/PMS developed and drafted the RFP requirements in preparing the "hardware" study. Also, PRC/PMS has referred to a number of other LEAA funded procurements to indicate that LEAA acted arbitrarily and capriciously in applying the guideline in this case. However, from the evidence presented to our Office, there is no indication that any of the referenced procurements fell under the LEAA guideline.

#### NOTICE OF GUIDELINE

PRC/PMS also complains that it had no notice of possible exclusion from competition because of its study contract work. PRC/PMS alleges that this lack of notice to an offeror with respect to so serious a matter is inconsistent with basic principles of Federal procurement law. PRC/PMS asserts that merely incorporating LEAA's Manual 7100.1A by reference into its study contract does not give sufficient notice of the paragraph 49e exclusion.

In support of this proposition, PRC/PMS references ASPR Appendix G (1975 ed.), which provides that an offeror cannot be excluded for an organizational conflict of interest unless there is a provision in the initial study or research and development RFP notifying offerors that they may be barred from competing for the "follow-on" implementation or production contracts. See ASPR § 1-113.2(a) (1975 ed.). We have consistently held that the ASPR provisions are not self-executing, and may be applied only if specifically incorporated into a solicitation. See 48 Comp. Gen. 702 (1969); 49 Comp. Gen. 463 (1970).



Also, PRC/PMS claims the repeated assurances it was given by Denver that it would not be excluded from competition removes any constructive notice it may have had of the LEAA organizational conflict of interest requirement. These assurances include (1) the advice by Denver to PRC/PMS, prior to submission of its proposal for the study contract, that PRC/PMS would not be barred from competing on the implementation phase; (2) the inclusion of PRC/PMS on the bidders list for the implementation RFP; (3) section B.13 of the implementation RFP (quoted above) which PRC/PMS contends implied that it could compete; and (4) the statements by Denver officials at the bidders conference that PRC/PMS could compete. In addition, neither Denver nor LEAA notified PRC/PMS of LEAA's determination that PRC/PMS could not compete.

Clause 26 of the study contract (quoted above) specifically incorporated by reference LEAA Manual 7100.1A. The Courts, Boards of Contract Appeals, and our Office have consistently recognized that where a document or publication is referred to in a contract, the contractor, in legal effect, has constructive knowledge of its contents, and actual ignorance of the contents will not avail as a defense. See Guerini Stone Co. v. P.J. Carlin Construction Co., 240 U.S. 264 (1916); Rehart v. Clark, 448 F.2d 170, 174 (9th Cir. 1971); U.S. Plastic Bandage Company, GSBGA No. 1701, 65-2 BCA 5231 (1965); 48 Comp. Gen. 689 (1969); 1 McBride and Wachtel, Government Contracts, § 4.100[4]; 4 Williston on Contracts, § 628 (3rd ed. 1961).

Therefore, PRC/PMS had constructive notice and was bound by the provision when it entered into the study contract. PRC/PMS admittedly made no effort to obtain LEAA Manual 7100.1A. In the circumstances, any contrary oral advice from Denver, while regrettable, is not legally significant.

In any case, even if PRC/PMS had not been given adequate notice of the LEAA guideline, it still would have been properly excluded from competition, since the guideline had been made a condition of the LEAA grant to Colorado. It is clear that conditions, which bind the grantee, may be incorporated by reference into the grant agreement in much the same manner as they are incorporated by reference into other contractual agreements. See Lametti & Sons,

B-184926

Inc., 55 Comp. Gen. 413 (1975), 75-2 CPD 265. By virtue of the LEAA grant agreement, these obligatory conditions are also passed on to apply to LEAA subgrantees. See paragraphs 15 and 17 of Colorado's and Denver's Applications for Grant Discretionary Funds (quoted above); B-171019, June 3, 1975. Therefore, Denver was legally bound to follow the LEAA guideline, and reject PRC/PMS's proposal if PRC/PMS came under the guideline. See 42 Comp. Gen. 289, 294 (1962); Illinois, supra.

Also, it is the duty and responsibility of LEAA to see that a grantee complies with the conditions attached to its grants, such as the paragraph 49e guideline. See 42 Comp. Gen., supra; 52 Comp. Gen. 874 (1973); F.J. Busse Company, Inc., B-180075, May 3, 1974, 74-1 CPD 225. The most practical means by which LEAA can enforce compliance with paragraph 49e (besides refusing to further fund the project) is to reserve the right to approve grantee's (and subgrantee's) proposed contract awards. See Special Condition 5 of LEAA's Grant Adjustment Notice dated November 19, 1974 (quoted above).

From the foregoing, it is clear that the LEAA organizational conflict of interest guideline (unlike ASPR Appendix G (1975 ed.)) is self-executing. That is, paragraph 49e automatically attaches to projects funded by LEAA when the circumstances described in the guideline exist. Therefore, even if an LEAA grantee fails to adequately apprise bidders of the existence of paragraph 49e, it does not preclude or relieve LEAA from asserting its duty when it reviews the contract award to assure that the grant condition is complied with. Moreover, a grantee or subgrantee must necessarily give some notice of the guideline to its contractors, if only by incorporation of Manual 7100.1A by reference into its contracts, because paragraph 15 of the Grant Application for Discretionary Funds (quoted above) requires grantees to "pass down" LEAA's grant conditions to its contractors. Also see Gould, supra, where an offeror was properly excluded from competition by an RFP provision in a direct Federal procurement by virtue of a previous contract, even though there was no provision in the previous contract warning it of its possible exclusion from future procurements.

Moreover, since Denver, in disbursing LEAA funds, cannot be regarded as an "agent" of LEAA, it cannot act to waive the grant condition or preclude LEAA from enforcing it. See 37 Comp. Gen.

B-184926

85, 87 (1957), and discussion on estoppel below. Therefore, the repeated assurances by Denver to PRC/PMS that it could compete for the implementation contract did not bind LEAA.

In view of the foregoing, the lack of a specific reference in the study contract and the implementation solicitation to the fact that PRC/PMS would be excluded from competing for the implementation contract does not prevent the application of paragraph 49e to PRC/PMS.

#### WAIVER OF LEAA GUIDELINE

PRC/PMS also protests LEAA's refusal to waive the organizational conflict of interest guideline. As indicated above, this regulation was promulgated in implementation of section 501 of the Omnibus Crime Control and Safe Streets Act of 1968, supra.

"An applicant for waiver [of an agency regulation] faces a high hurdle even at the starting gate," and must show an agency's "reasons for declining to grant the waiver were so insubstantial as to render that denial an abuse of discretion." See WAIT Radio v. Federal Communications Commission, 459 F.2d 1203, 1207 (D. C. Cir. 1972), cert. denied 409 U.S. 1027 (1972). PRC/PMS has not presented any probative evidence which would show such an abuse of discretion, especially considering that an LEAA waiver would have affected the interests of other parties (e.g., MWSC). See Bonita, Inc. v. Wirtz, 369 F.2d 208 (D. C. Cir. 1966) and Borough of Lansdale, Pennsylvania v. Federal Power Commission, 494 F.2d 1104 (D. C. Cir. 1974), where it was found that an agency is bound to its regulations if a waiver would adversely affect another party.

#### ESTOPPEL

PRC/PMS has also argued that LEAA should have been estopped from refusing to allow the PRC/PMS award. Consequently, PRC/PMS asks that the MWSC award be terminated and award be made to PRC/PMS, and, in the alternative, that PRC/PMS be awarded its proposal preparation costs. PRC/PMS bases its estoppel argument primarily

B-184926

on the specific advice by Denver at the bidders conference that PRC/PMS could compete.

PRC/PMS also references LEAA's review and approval of the implementation RFP containing section B.13 (quoted above). However, section B.13 only concerns the non-applicability of the study contract's "hardware exclusion" clause, which was a completely separate requirement from paragraph 49e of LEAA Manual 7100.1A. PRC/PMS also contends that before submitting its proposal for the study contract, it was informed by Denver after consulting with LEAA that the "hardware exclusion" clause of the study contract would not preclude it from competing on the implementation phase. However, LEAA has no recollection of such consultation.

Four elements are necessary to establish an estoppel against the Federal Government. Fink Sanitary Service, Inc., 53 Comp. Gen. 502 (1974), 74-1 CPD 36. These elements, set out in United States v. Georgia-Pacific Company, 421 F.2d 92, 96 (9th Cir. 1970), and Emeco Industries, Inc. v. United States, 485 F.2d 652 (Ct. Cl. 1973), are as follows:

- 1) the party to be estopped must know the facts;
- 2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
- 3) the latter must be ignorant of the true facts;
- 4) he must rely on the former's conduct to his injury.

There has been no showing that PRC/PMS relied upon any assurances or actions by responsible LEAA officials that PRC/PMS would be able to compete on the implementation procurement. Denver, upon whose assurances PRC/PMS may have detrimentally relied, is not the Government's agent, and cannot act to estop the Federal Government. See 37 Comp. Gen. supra. Therefore, the fourth necessary element to establish an estoppel has not been met. Cf.

B-184926

Dumont Oscilloscope Laboratories, Inc., B-183434, January 15, 1976, 76-1 CPD 31.

The cases cited by PRC/PMS to support estoppel, i.e., Manloading & Management Associates, Inc. v. United States, 461 F.2d 1299 (Ct. Cl. 1972), and Sylvania Electric Products, Inc. v. United States, 458 F.2d 994 (Ct. Cl. 1972), are not applicable here, since they involved estoppels found against the Government because of statements made by its representatives.

Finally, LEAA apparently did not know all of the facts showing that PRC/PMS was under paragraph 49e prior to communicating this fact to the grantee. Consequently, the first element to establish an estoppel has not been satisfied either.

Therefore, notwithstanding that PRC/PMS may have been misled by Denver, LEAA was not estopped from rejecting the proposed award to PRC/PMS, or from approving the award to MWSC. Moreover, PRC/PMS's claim for proposal preparation costs against the Federal Government cannot be allowed under the estoppel theory.

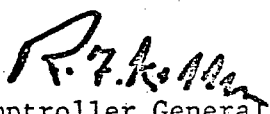
#### PROPOSAL PREPARATION COSTS

Furthermore, from the foregoing, it is apparent that PRC/PMS's claim for proposal preparation costs cannot be allowed under the standards of "arbitrary and capricious action" set forth in T&H Company, 54 Comp. Gen. 1021 (1975), 75-1 CPD 345, and Keco Industries, Inc. v. United States, 492 F.2d 1200 (Ct. Cl. 1974). Consequently, we do not feel compelled to decide the question of whether a disappointed bidder on a Federal grantee procurement can recover bid or proposal preparation costs based upon the T&H/Keco standards. Cf. Bell & Howell Company, 54 Comp. Gen. 937 (1975), 75-1 CPD 273. Moreover, PRC/PMS's claim for allocated overhead directly related to its efforts to obtain a waiver of the LEAA guideline is clearly not recoverable in any case. See T&H, supra, at 1027; Descomp, Inc. v. Sampson, 377 F. Supp. 254 (D. Del. 1974).

B-184926

CONCLUSION

In view of the foregoing, PRC/PMS's complaint and claims are denied. However, we believe the procedure can be improved. Incorporation of documents by reference puts a contractor on constructive notice of their contents. However, considering the significant impact of paragraph 49e, applicable RFP's should expressly and clearly include notice of its provisions.

  
Deputy Comptroller General  
of the United States